

DOCKET FILE COPY ORIGINAL

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BEFORE THE FEDERAL COMMUNICATIONS COMMISSION
Washington, D.C.

RECEIVED

FEB 19 1993

In Re:

) MM Docket 92-202
) RM-8051

FEDERAL COMMUNICATIONS COMMISSION
OFFICE OF THE SECRETARY

) Amendment to Section 73.202(b)
) Table of Allotments
) FM Broadcast Stations
) (Newberry Springs, CA)
)

To: Chief, Allocations Branch

MOTION TO ACCEPT LATE-FILED OPPOSITION TO
MOTION TO ACCEPT LATE-FILED COMMENTS

Hills Broadcasting ("Hills"), by its attorney, hereby moves for leave to file the Opposition to Motion to Accept Late-Filed Comments that is attached hereto. Pursuant to Section 1.45 of the Commission's Rules, the attached Opposition was due on February 11, 1993.

Hills was unable to file the Opposition within the time specified in the Rules due to the need to consult with its engineering consultant and the need to obtain a copy of the application of Henry Broadcasting Company to relocate the facilities of Station KHTX referred to in the Motion at which the Hills' Opposition is directed. Due to an oversight, Hills neglected to request an extension of time for filing the Opposition prior to the filing deadline.

Counsel for Henry Broadcasting Company has authorized the

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undersigned to represent that Henry Broadcasting Company does not object to grant of this Motion.

Respectfully submitted,

A handwritten signature in black ink, appearing to read 'David Tillotson', written over the printed name.

David Tillotson
3421 M Street, NW, Suite 1739
Washington, DC 20007
(202) 625-6241

Attorney for Hills Broadcasting

February 19, 1993

CERTIFICATE OF SERVICE

I, David Tillotson, do hereby certify that a copy of the foregoing **MOTION TO ACCEPT LATE-FILED OPPOSITION TO MOTION TO ACCEPT LATE-FILED COMMENTS** has been sent via first-class mail, postage prepaid, this 19th day of February, 1993 to the following:

Allan G. Moskowitz, Esq.
Kaye Scholer Fierman Hays & Handler
The McPherson Building
901 Fifteenth Street, NW, Suite 1100
Washington, DC 20005


David Tillotson

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BEFORE THE FEDERAL COMMUNICATIONS COMMISSION
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In Re:) MM Docket 92-202 FEDERAL COMMUNICATIONS COMMISSION
) RM-8051 OFFICE OF THE SECRETARY
Amendment to Section 73.202(b))
Table of Allotments)
FM Broadcast Stations)
(Newberry Springs, CA))

To: Chief, Allocations Branch

OPPOSITION TO MOTION TO ACCEPT LATE-FILED COMMENTS

Hills Broadcasting ("Hills"), by its attorney, hereby opposes the Motion to Accept Late-Filed Comments that Henry Broadcasting Company, licensee of Station KHTX(FM), Riverside, California ("KHTX") filed in this proceeding on January 28, 1993. KHTX seeks leave to file late comments in this proceeding for the purpose of proposing that Channel 279A be allotted to Newberry Springs in lieu of Channel 247A so as to clear the way for KHTX to relocate its facilities to a site which would be short-spaced to the proposed allotment of Channel 247A at Newberry Springs. For the reasons discussed below, the Motion should be denied.

KHTX's "late-filed comments" are a thinly veiled attempt by KHTX to circumvent the cut-off procedures for the filing of applications proposing facilities which conflict with channel allocations proposed in rulemaking proceedings which were recently adopted by the Commission in its Report and Order in MM Docket 91-348, 7 FCC Rcd 4917 (1992). While the objective in MM Docket 91-348 was to establish cut-off procedures to afford transmitter site protection to applicants for new or changed facilities against

subsequently filed rulemaking proposals,¹ the rules adopted in the proceeding were designed to "protect the emergent plans of rulemaking petitioners as well" by establishing complementary and consistent cut-off procedures both for applications that conflict with rulemaking proposals and for rulemaking proposals that conflict with applications. 7 FCC Rcd at 4920. Under the rules promulgated in MM Docket 91-348 and pursuant to the policy considerations underlying the Commission's actions in that docket, the deadline for KHTX to have filed an application conflicting with the channel allotment proposal in the instant docket was the comment deadline established by the Notice of Proposed Rulemaking, i.e., October 26, 1992.² Acceptance of KHTX's application at this time under the guise of "late-filed comments" would eviscerate the policy, and rules, adopted in Docket 91-348.³

Even if KHTX's "late-filed comments" were merely comments in the traditional sense, and not an attempt to circumvent the cut-off rules with respect to applications that conflict with

¹ Rulemaking proposals were already protected from subsequently filed applications by the provisions of Sections 73.207 and 73.208 which required applications to specify transmitter sites that were fully-spaced to rulemaking reference points.

² Simultaneously herewith, Hills is filing a Motion to Dismiss KHTX's application to relocate its facilities to a site that is short-spaced to the reference point for Channel 247A at Newberry, California established by the Notice of Proposed Rule Making in this proceeding on the grounds that the application is unacceptable under Section 73.207 of the Rules.

³ In this regard, it is significant that KHTX had been considering relocating its facilities to the site proposed in the application that it filed three months after the comment deadline in this proceeding for four years prior to that deadline. That this is so is evident from the fact that Exhibit VB-10 to KHTX's application filed January 25, 1993 is a directional antenna study for the facilities specified in that application that was prepared for KHTX in November, 1987. With the technical study for the site having been completed four years before the comment deadline, KHTX's attempt to intervene in this proceeding at this late date is inexplicable and inexcusable.

rulemaking proposals, the comments would have to be rejected. As noted above, the deadline for filing comments in this proceeding was October 26, 1992. The deadline for filing reply comments was November 10, 1992. Pursuant to Section 1.415(d) of the Rules, no additional comments are permitted "unless specifically requested or authorized by the Commission." The purpose behind this, and similar, procedural rules is to insure that interest parties are afforded a full opportunity to participate in a proceeding while, at the same time, establishing a process to assure that proceedings are resolved in an orderly and relatively expeditious manner. To grant KHTX's Motion and accept comments filed more than three months after the deadline established by the Notice of Proposed Rulemaking would defeat the purpose of Section 1.415 and, contrary to KHTX's assertion, would prejudice both Hills and the public interest by delaying resolution of this proceeding.⁴

The cases relied upon by KHTX as precedents for the Commission to accept its late-filed comments are clearly inapposite.⁵ In each of these cases, the late-filed comments that were accepted and considered contained proposals for resolving conflicts between timely filed conflicting rulemaking proposals and/or applications. In such circumstances the public interest in the early resolution

⁴ Prejudice could also occur to other parties who might be adversely affected by the proposed channel substitution in this proceeding but would be denied notice of KHTX's alternate proposal and an opportunity to comment upon it.

⁵ The cases relied upon by KHTX are: Mechanicsville, Ruckersville, Williamsburg and Fort Lee, Virginia, 7 FCC Rcd 6309 (1992); Benton Tennessee, 6 FCC Rcd 3481 (1991); North Fort Riley and St. Marys, Kansas, 6 FCC Rcd 3751; and Lima Ohio, Muncie Indiana, Rockford, Illinois and Grand Rapids, Michigan proceeding, DA-92-113 released September 9, 1992.

of rulemaking proceedings, and in some cases the early establishment of improved service, was served and, at the same time, the private interests of all parties that had timely filed applications and proposals were accommodated. In the instant case, there are no conflicting proposals to be resolved since the application that KHTX would like the Commission to consider was not timely filed pursuant to the established cut-off procedures and cannot, under Sections 73.207 and 73.208, be accepted unless the allotment proposal under consideration in this proceeding is denied for reasons wholly unrelated to that KHTX's desire to file such an application.

In view of the clear cut-off procedures established in MM Docket 91-348, it would be inappropriate for the Commission to give any consideration whatsoever to KHTX's arguments that public interest benefits from acceptance of its late-filed comments as, whatever those public interest benefits might be, they are far outweighed by public interest benefit that will flow from preserving the integrity of the cut-off procedures that have been so recently adopted. In any event, KHTX's public interest arguments are all self-serving and make-weight. Moreover, they are not substantiated by an affidavit or declaration under penalty of perjury from someone with actual knowledge of the factual matters on which the arguments are predicated.⁶ Consequently, even if the

⁶ The only support offered for KHTX's "public interest" arguments is a "Technical Statement in Support of Comments by Henry Broadcasting" that was prepared by an employee of KHTX, Joe Sanford Mauk. Mr. Mauk's only credential for giving such a statement is that he is an "experienced radio engineer." Mr. Mauk does not claim to be a registered professional engineer or to have any training that would qualify

arguments had been timely raised, they could not be properly taken into consideration in this proceeding.

The first "public interest" argument advanced by KHTX is that substitution of Channel 279A for 247A at Newberry Springs will enable KHTX to move its transmitter site to the north. According to KHTX, population growth since 1947 when KHTX selected its current transmitter site has "extended the metropolitan area north into the San Bernardino mountains and beyond." The fact is, however, that the communities beyond the San Bernardino Mountains to the north that KHTX claims it cannot now adequately serve -- Hesperia, Victorville, Adelanto and Apple Valley -- are located 30 to 40 miles north of KHTX's city of license, Riverside, and in the separate Victor Valley, CA Radio Market as defined, and surveyed, by Arbitron.⁷ These communities are well served by existing local radio stations. While extending KHTX's signal into these communities might serve KHTX's private interest of reaching over the San Bernardino Mountains into the Victory Valley, CA radio market, such an extension not only will not serve the public interest in any way, but it will harm the public interest by

him as an expert witness in the field of broadcast engineering. More significant than the lack of credentials is that fact that Mr. Mauk's Technical Statement is not in the form of an Affidavit and is not signed under penalty of perjury. In fact, as far as Mr. Mauk was willing to go in attesting to the reliability of the facts alleged in his Technical Statement is to say that "All representations contained herein are true to the best of my knowledge." As KHTX is represented by experienced communications counsel, the fact that Mr. Mauk did not swear under penalty of perjury to the accuracy and reliability of his statements is a strong indication that he prepared the Statement as an accommodation to his employer, but did not have a high degree of confidence in the statements that his employer asked him to make.

⁷ Attached hereto is the front page of the Spring, 1992 rating book for this radio market which establishes that the Victor Valley is a separate and distinct radio market for ratings purposes.

drawing revenues out of this small market that the local stations need in order to remain viable.

Moreover, the population changes that KHTX cites as a justification for accepting its late-filed comments did not occur overnight, or in the space of the three months and a few days that elapsed since the comment deadline. Therefore, KHTX's claim that the substitution of Channel 279A for 247A at Newberry Springs will benefit the "public interest" by enabling KHTX to move its transmitter site north is clearly a claim that KHTX could have, and should have, raised by the initial comment deadline.

KHTX's arguments that by moving its transmitter site north into the San Bernardino Mountains it will "almost" eliminate a grandfathered short-spacing to Station KSON and it will clear the way for a proposed allotment of Channel 249B at Tijuana, Mexico are also arguments that were available to KHTX when comments were due in this proceeding and, therefore, should have been made at that time. In any event, these arguments are obviously make-weights in an effort to clothe KHTX's private interest in getting its signal over the San Bernardino Mountains into the Hesperia-Victorville-Apple Valley market in "public interest" garb. If KHTX is legitimately concerned with reducing the short-spacing to KSON or clearing the way for the proposed Mexican allotment, these objectives could be accomplished by relocating KHTX's facilities to a site in the foothills on the southern side of the San Bernardino Mountains so that the mountains would provide the requisite "contour protection" to the proposed Newberry allotment.

Finally, KHTX's attempt to bolster its public interest argument by bringing in a "public safety" argument is sheer sophistry. While KHTX claims that the San Bernardino Mountains prevent stations in the northern part of San Bernardino County from receiving "county and operational area activations of the Emergency Broadcast System" emanating from KHTX, the fact is that stations on the north side of the mountains do not need to monitor KHTX to obtain local and regional emergency information. The Commission's records reflect that Stations KZXY-AM/FM, in Apple Valley, California which serve the communities in the Victory Valley radio market that KHTX claims are without access to off-the-air local and regional EBS information, are primary stations in the EBS system and they monitor, presumably without difficulty, Station KGGI(FM), Riverside, California, which is believed to operate from the site to which KHTX seeks to relocate. Thus, it is obvious that the claim that there is a problem with disseminating local and regional EBS information to communities in the Victor Valley that relocation of KHTX will solve is a fantasy conjured up to give a public interest gloss to KHTX's outrageously late attempt to intervene in this proceeding.

WHEREFORE, for the foregoing reasons, the Motion to Accept Late Filed Comments filed in this proceeding by Henry Broadcasting Company should be summarily denied.

Respectfully submitted,

A handwritten signature in black ink, appearing to read 'David Tillotson', is written over the typed name.

David Tillotson
3421 M Street, NW, Suite 1739
Washington, DC 20007
(202) 625-6241

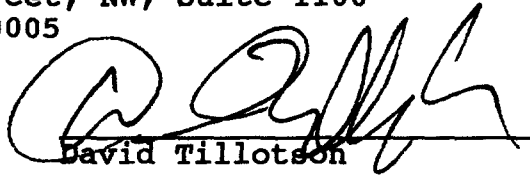
Attorney for Hills Broadcasting

February 19, 1993

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David Tillotson

**NEW
POPULATION ESTIMATES**

Populations for this report are
based on 1990 Census data.
See Page 5 for details.

IMPORTANT

Rating Distortion and
Special Station Activities
Guidelines have been updated
on Page 4 for new text

ARBITRON

IMPORTANT

Special Station Activity
is noted for this market
report. See page 5
for details.

Audience Estimates in the
Subscriber Designed Area for:

Victor Valley, CA

Spring 1992

April 2 - June 24